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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 FEDERAL TRADE COMMISSION,

4 Plaintiff,

5 v.

20 CV 4432(JSR)  
Trial

6 JONATHAN BRAUN, et al,

7 Defendants.

8 -----x  
9 New York, N.Y.  
January 10, 2024  
10 9:30 a.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge  
-and a Jury-

14 APPEARANCES

15 FEDERAL TRADE COMMISSION  
Attorneys for Plaintiff  
16 BY: GREGORY ASHE  
JULIA HEALD

17 AIDALA BERTUNA & KAMINS PC  
Attorneys for Defendants  
18 BY: MICHAEL DIBENEDETTO

19 LAW OFFICES OF BARATTA, BARATTA & AIDALA  
Attorneys for Defendants  
20 BY: JOSEPH BARATTA

21 Also Present:

22 Molly Smith, FTC Paralegal  
Ken Kotarski, FTC Trial Tech  
23 Emma Barbacci, Defense Paralegal  
24  
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1 (Trial resumed; jury not present; case called)

2 MR. DIBENEDETTO: Your Honor, before you bring in the  
3 jury, I wanted to remind you or inform the jury that all of the  
4 Kessef Capital documents are going to be removed.

5 THE COURT: Yes.

6 MR. ASHE: Do you want us to provide the clerk with  
7 the copies of the exhibits now or after?

8 THE COURT: After.

9 MR. ASHE: After closing.

10 THE COURT: Yes.

11 MR. ASHE: Okay.

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1 (Jury present)

2 THE COURT: Good morning, ladies and gentlemen. Once  
3 again, thank you for your promptness.

4 In a minute, we're going to hear closing arguments.  
5 There was one other evidentiary point I wanted to bring to your  
6 attention.

7 You may possibly recall that there were certain  
8 documents and portions of documents relating to an entity  
9 called Kessef. They were received subject to connection. The  
10 connection was never made, and so those have now been excluded.  
11 So we won't send in those exhibits to you, and anything you  
12 remember about those particular exhibits you should now put out  
13 of your mind. They are no longer part of the case.

14 So we're now going to hear closing arguments of  
15 counsel. Each side has been allotted up to an hour. They may  
16 not take that much. And you will recall that the burden of  
17 proof is on the plaintiff, the FTC, so they will go first.

18 I should also mention before I forget it: Just as I  
19 told you in opening statements, nothing that counsel says is  
20 evidence. This is their opportunity to tell you what they  
21 think the evidence amounts to. The evidence is only the  
22 testimony of the witnesses, the exhibits that were received,  
23 and the stipulated or the found facts, the undisputed facts I  
24 gave you yesterday in writing and read to you earlier.

25 Go ahead.

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Summation - Mr. Ashe

1 MR. ASHE: May I begin, your Honor?

2 THE COURT: Please.

3 MR. ASHE: Members of the jury, thank you for your  
4 time and your attention these past several days. I ask for  
5 your attention for just a little bit more.

6 My name is Gregory Ashe, and together with my  
7 colleague, Julia Heald, we represent the plaintiff, the  
8 Federal Trade Commission, or the FTC, for the consumer.

9 The mission of the FTC is to protect consumers by  
10 enforcing the nation's consumer protection laws to ensure a  
11 free and fair marketplace, and that's what we're doing here.

12 We brought this case to protect a group of consumers,  
13 small businesses, small businesses trying to make a go at it,  
14 small businesses that needed money to operate, small businesses  
15 that, for whatever reason, were not able to obtain traditional  
16 financing. So they reached out to defendant Braun's company,  
17 Richmond Capital, to get what are called merchant cash  
18 advances.

19 Now, you heard evidence of how these merchant cash  
20 advances work. Richmond Capital and these small businesses  
21 entered into contracts called merchant agreements. Now,  
22 according to the merchant agreements, Richmond Capital would  
23 give these businesses an agreed amount of money called the  
24 total purchase price, and then make daily withdrawals from the  
25 businesses' bank accounts until Richmond Capital collected an

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Summation - Mr. Ashe

1 agreed amount called the agreed total purchased amount. But  
2 that's not what happened.

3 Instead, in many instances, as the Court already  
4 found, Richmond Capital would deduct significant fees,  
5 sometimes without the consumers having any knowledge of those  
6 fees. Other times, consumers agreed to some fees. But  
7 Richmond Capital deducted even more than those agreed-upon  
8 fees, the result being that small businesses often receive  
9 significantly less funding than what was promised.

10 And, again, as the Court already found, in many  
11 instances, Richmond Capital kept making daily withdrawals from  
12 the businesses' bank account, even after the total purchased  
13 amount was paid. The result being that small businesses paid  
14 substantially more than what Richmond Capital promised to  
15 collect from them. Now, to stop these egregious practices, in  
16 June 2020, the FTC sued defendant Braun and Richmond Capital  
17 and several other defendants, two of whom you heard yesterday.

18 The FTC charged that the ways in which the defendants  
19 marketed, collected, and serviced their merchant agreements  
20 violated the FTC Act, which prohibits unfair deceptive acts or  
21 practices, and Section 521 of the Gramm-Leach-Bliley, or the  
22 GLB Act, which prohibits making false, fictitious, or  
23 fraudulent statements in order to get someone's bank informers.

24 Now, I want to say again that the Court has already  
25 determined that defendant Braun violated the law. That is not

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Summation - Mr. Ashe

1 in dispute, and that is not something that you need to decide.  
2 You are here to decide the amount of money that defendant Braun  
3 should pay for his violations.

4 There are two types of monetary relief that the FTC is  
5 seeking in this case: First, a consumer redress judgment, an  
6 amount to be returned to the small businesses based on the harm  
7 they suffered; and second, a type of fine called a civil  
8 penalty.

9 I'd like to start with the first type of money  
10 judgment that we are asking you to enter.

11 Because defendant Braun violated Section 21 of the  
12 GLB Act, Section 19 of the FTC Act allows for the entry of a  
13 monetary judgment to redress or remedy the harm to consumers  
14 caused by those violations. Now, the question for you is not  
15 whether consumer redress judgment should be entered, but how  
16 much that judgment should be.

17 As the Court will instruct you, the law requires that  
18 we demonstrate a reasonable estimate of that amount, the amount  
19 of the harm caused by the defendant's violations of the  
20 GLB Act. Then the burden is going to shift to defendant Braun  
21 to prove to you by a preponderance of the evidence that our  
22 estimate was not reasonable or inaccurate.

23 Now, the Court also is going to instruct you that the  
24 law requires that we prove our case by what's called a  
25 preponderance of the evidence; in other words, that it is more

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Summation - Mr. Ashe

1 likely than not true, our claims.

2 So I want you to imagine scales, and as long as the  
3 scales tip slightly in our favor, then the FTC has met its  
4 burden.

5 Now, Section 19 of the FTC Act, which governs the  
6 consumer redress, has what is called a three-year statute of  
7 limitations. That means we need to demonstrate to you the  
8 amount of consumer harm caused in the three years before we  
9 filed our complaint in June of 2020.

10 Now, remember when Dr. McAlvanah testified on Monday?  
11 He testified about the amount of consumer harm caused by  
12 defendant's over-collection and underfunding practices. Let's  
13 start with the over-collection violations.

14 He testified that there was a total population of 918  
15 deals where the defendants made withdrawals within the  
16 three-year period. Now, why did Dr. McAlvanah use those deals?  
17 Because as long as defendants were still making withdrawals,  
18 they are still telling small businesses they owe money even  
19 when this wasn't true, unless they're still violating the law.

20 Then Dr. McAlvanah described how based on his analysis  
21 of a statistically valid random sample of those 918 deals, the  
22 defendants over-collect 26.9 percent of the time, or 246 of  
23 those 918 deals. He also testified that it was statistically  
24 reasonable that the violation rate could be as high as  
25 41 percent, or 376 out of those 918 deals. Dr. McAlvanah

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Summation - Mr. Ashe

1 further testified that the average amount that was  
2 over-collected was \$9,397 per deal.

3 Now, if you multiply those numbers, the 376 deals with  
4 over-collections by the 9,397 per deal, the consumer injury  
5 caused by the over-collection practices was \$3,533,272.

6 Now, with respect to defendant's underfunding  
7 violations, remember, that's where they held back more in  
8 undisclosed, sometimes bogus, fees than what was promised.  
9 Dr. McAlvanah testified there was a total population of 768  
10 deals where the first withdraw was within the three-year  
11 period.

12 Why the different number? Because for underfunding,  
13 we're looking at the start of the merchant cash advance deal.  
14 That's the time that the defendant lied to small businesses  
15 about how much money they are going to receive.

16 Now, Dr. McAlvanah testified to you based on his  
17 analysis of a statistically valid random sample of those 768  
18 deals that the defendants underfunded 47.4 percent of the time,  
19 or on 364 of those deals.

20 He also testified that it was statistically reasonable  
21 that the violation rate could be as high as 71.1 percent, or  
22 546 deals. But Dr. McAlvanah further testified that the  
23 average amount underfunded was \$3,022 per deal. And if we  
24 multiply those numbers, the 546 deals with underfunding and the  
25 \$3,022 of underfunding per deal, that yields a consumer injury



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Summation - Mr. Ashe

1 caused by the underfunding of \$1,650,012.

2 Now, as Dr. McAlvanah testified, these numbers are  
3 statistically reasonable. They are based on a random sample, a  
4 method that is scientifically valid and widely used in the  
5 field of economics.

6 You may wonder why the FTC used a random sample  
7 instead of looking at every deal. Well, as FTC investigator  
8 Ms. Kwok testified, finding the relevant data was a very  
9 laborious process requiring manual review of hundreds of  
10 documents from Richmond Capital that were not labeled or even  
11 organized. As you recall from Dr. McAlvanah, this was one of  
12 the very reasons that random samples are so widely used. Thus  
13 I submit to you that the FTC has demonstrated that it is more  
14 likely than not that the defendants caused a total of  
15 \$5,183,284 in consumer harm.

16 Now, under the law, the burden now shifts to defendant  
17 Braun to try to prove to you by a preponderance of the evidence  
18 that our numbers are not reasonable. And he has not shown you  
19 any evidence to suggest that the FTC's calculations are not  
20 reasonable. The defendants may try to argue that the FTC is  
21 trying to sneak in damages after December 2018 when Mr. Braun  
22 was supposedly fired from Richmond Capital, but there's been no  
23 evidence that he was ever fired or ever stopped controlling  
24 Richmond Capital.

25 In fact, the evidence shows, looking at

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Summation - Mr. Ashe

1 Richmond Capital's bank statements in Exhibit 45, that  
2 defendant Braun remained on Richmond Capital's bank statements  
3 dated December 31, 2018. And Ms. Kwok testified that the last  
4 deal in that database was in November 2018, a month before  
5 Mr. Braun was supposedly fired.

6 Now, defendant Braun may also try to argue that  
7 because Dr. McAlvanah did not personally review the underlying  
8 merchant cash advance agreements, that somehow his calculations  
9 are suspect.

10 As the Court reminded you, it's not uncommon for an  
11 expert to rely on information that has been provided by other  
12 people. Moreover, as you heard from Ms. Kwok, the spreadsheets  
13 that were provided to Dr. McAlvanah accurately reflected the  
14 data that was provided to Dr. McAlvanah, accurately reflected  
15 the data that were in the merchant agreements and the bank  
16 processing documents, and defendant Braun put on no evidence to  
17 suggest otherwise.

18 In fact, defendant Braun put on no evidence that the  
19 methodology by which Dr. McAlvanah drew the random sample was  
20 incorrect, or that the methodology by which he made his  
21 calculations was in error. Thus I submit to you, defendant  
22 Braun has failed to carry his burden, and that the FTC's  
23 calculations of \$5,183,284 in consumer harm is reasonable.

24 Now, when you begin your deliberations, the Court is  
25 going to give you a verdict form. This is what it's going to

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Summation - Mr. Ashe

1 look like. The first question reads: We the jury award the  
2 FTC the following monetary damages from defendant Braun. Now,  
3 based on the evidence, I respectfully ask that you enter  
4 \$5,183,284 in monetary damages on the verdict form.

5 I now want to turn to the second type of monetary  
6 judgment that the FTC is seeking, and that's civil penalties.

7 Now, because defendant Braun violated Section 521 of  
8 the GLB Act, Section 5 of the FTC Act, a different provision,  
9 allows for the entry of civil penalties if he acted knowingly.

10 As the Court will shortly instruct you, the FTC must  
11 first show that defendant Braun knew that material  
12 misrepresentations were being made with his consent about the  
13 amounts the defendants would provide to and collect from  
14 consumers; and second, that the FTC must show that the  
15 defendant, Braun, knew or should have known he was violating  
16 the GLB Act.

17 And as the Court will instruct, we do not need to  
18 prove actual knowledge. Instead, it is enough if a reasonable  
19 person in the same situation as defendant Braun would have  
20 known of the GLB Act. And the evidence is clear that it is  
21 more likely than not that defendant Braun, or a reasonable  
22 person in his shoes, knew or should have known that his conduct  
23 was prohibited by the GLB Act.

24 Now, you heard Ms. Kwok testify that Richmond Capital  
25 used a company called Actum Processing as its payment

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Summation - Mr. Ashe

1 processor. She explained that a payment processor is a company  
2 that facilitates electronic payments between businesses and  
3 their customers. So Actum Processing is what enabled  
4 Richmond Capital to make those daily withdrawals from their  
5 customers.

6 As Ms. Kwok, who, as you heard, is a certified fraud  
7 examiner, explained merchant accounts are everything to a  
8 business, and without one, a business can't accept money from  
9 their customers.

10 Now, remember Exhibit 38, the client services  
11 application agreement that Richmond Capital signed?  
12 Richmond Capital agreed as a condition of having that critical  
13 merchant account to follow the GLB Act. And as the Court told  
14 you, defendant Braun admitted that he knew of this agreement.  
15 Another service, very important to Richmond Capital, was  
16 getting information about potential customers.

17 As you heard Mr. Reich testify, and he was a  
18 codefendant of Mr. Braun's, obtaining such information was  
19 important to merchant cash underwriters. Now, a company called  
20 Thomson Reuters provides this type of service in what are  
21 called CLEAR reports.

22 In 2014 and again in 2017, Richmond Capital signed an  
23 account validation and certification form, which was in  
24 Exhibit 39, to get access to these CLEAR reports to do its  
25 underwriting. Now, as part of that certification,

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Summation - Mr. Ashe

1 Richmond Capital had to certify compliance with the GLB Act.  
2 And Richmond Capital agreed as a condition to access these  
3 reports that it, and all authorized persons, would comply with  
4 the GLB Act.

5 Now Mr. Reich testified that underwriting used CLEAR  
6 reports. And defendant Braun previously testified that among  
7 his other duties, he was heavily involved in Richmond Capital's  
8 underwriting. Now, defendant Braun may argue he never signed  
9 these agreements, not even an officer of Richmond Capital. You  
10 know, he's right. He didn't sign the Actum Processing  
11 agreement or the Thomson Reuters agreements. But that fact is  
12 not relevant. It doesn't mean anything.

13 He may also argue that his name was nowhere to be  
14 found on Richmond Capital documents, like tax returns. While  
15 that may be true about the tax returns – though, we have not  
16 seen any evidence of it – what is true is that defendant  
17 Braun's name does appear over Richmond Capital's bank  
18 statements. You saw a few of them a few minutes ago. And his  
19 name appears from at least May 2016 all the way through  
20 December 2018.

21 Now, these bank documents, along with Mr. Giardina,  
22 one of his codefendants, testimony -- and this is before he  
23 began invoking the Fifth Amendment, and Mr. Reich's testimony,  
24 they also show that the names, RCG Advances, Richmond Capital,  
25 RCG Advisory, these are interchangeable.

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Summation - Mr. Ashe

1 Now, the evidence shows even though defendant Braun  
2 was never named officer of Richmond Capital, that was  
3 Mr. Giardina, he was the person in charge -- the person who  
4 made all the decisions, called the shots.

5 Remember, the Court has already determined that it is  
6 undisputed that Mr. Braun exercised considerable control over  
7 all the defendants in this case. As defendant Braun put it in  
8 his previous testimony, he was there five days a week from  
9 day one. Mr. Giardina was not. And you may draw an adverse  
10 inference from Mr. Giardina's taking the Fifth.

11 Now, as the Court explained, when a person takes the  
12 Fifth Amendment, you may, based on the relationship between  
13 that witness and defendant Braun, you may draw an inference  
14 that had he testified truthfully and not asserted the Fifth,  
15 that his answer would have incriminated Mr. Braun.

16 And so when Mr. Giardina was asked but refused to  
17 answer that he considered defendant Braun to be in charge of  
18 Richmond Capital, you may draw the adverse inference that he  
19 was. Same with when he was asked whether Braun was responsible  
20 for the day-to-day decisions concerning underwriting, funding,  
21 collections.

22 Mr. Reich testified to the same thing. And defendant  
23 Braun certainly made sure that his employees knew it.

24 If you look at an e-mail that was shown to you as  
25 Exhibit 51, he tells employees, who is allowed to decide how

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Summation - Mr. Ashe

1 much a merchant owes other than me? Or Exhibit 57, when an  
2 employee asks if they should consult with Mr. Giardina,  
3 defendant Braun response, lol, you still don't realize who is  
4 in charge.

5 And regarding the act of Thomson Reuters' agreements,  
6 you may draw an adverse inference from Mr. Giardina that  
7 Mr. Giardina signed them at the direction of defendant Braun.  
8 And not only signed them, but that defendant Braun instructed  
9 him how to complete the agreements. Not just those agreements,  
10 you may draw the adverse inference that even though  
11 Mr. Giardina was the authorized signatory on Richmond Capital's  
12 bank statements, as you can see in Exhibit 68, it was defendant  
13 Braun who directed him as to when and how much to deposit into  
14 consumers' bank accounts.

15 It was so understood by employees that Mr. Giardina  
16 did sign things for Mr. Braun that Mr. Braun didn't want done  
17 or signed in his own name, that when defendant Braun was  
18 considering a replacement -- those CLEAR reports I mentioned  
19 earlier, one of his employees stated: Defendant Braun should  
20 request a free trial of the software, then she corrects  
21 herself, noting, well, Rob -- that is Mr. Giardina -- should  
22 request a free trial.

23 Now, QuarterSpot is another merchant cash advance  
24 company that Richmond Capital had an agreement with. The  
25 exhibit shows in Exhibit 40, that QuarterSpot sent directly to

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Summation - Mr. Ashe

1 defendant Braun an amendment to that partner agreement. The  
2 cover e-mail to defendant Braun explained that the amendment  
3 reflected changes made to clarify and update the applicable  
4 laws and regulations governing that agreement. Now, the  
5 amendment itself requires that Richmond Capital represent that  
6 it had not been or was currently the subject of any  
7 investigation or legal proceeding relating to violations of the  
8 GLB Act.

9 Remember, this was sent directly to defendant Braun.  
10 And what did he do with it? He forwarded that e-mail to  
11 Mr. Giardina, telling him sign the contract amendment.

12 Mr. Reich testified that in addition to CLEAR reports,  
13 merchant cash advance companies also use another report called  
14 a TLO report to underwrite deals. He explained how useful TLO  
15 reports are to underwriting merchant cash advance deals. The  
16 TLO reports in Exhibit 43 in this example -- and this TLO  
17 reports warn that the reports may only be used in accordance  
18 with the GLB Act.

19 And remember from Mr. Braun's earlier testimony that  
20 he was heavily involved in underwriting at Richmond Capital?  
21 Now, notice how often the GLB Act appears in all of these  
22 important documents, in the agreements for Richmond Capital's  
23 merchant accounts, in the agreements to get CLEAR reports for  
24 underwriting, in the QuarterSpot partner agreement, in the TLO  
25 requests.



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Summation - Mr. Ashe

1 Now, the defendant may try to argue that defendant  
2 Braun has never heard of the GLB Act. But they never presented  
3 any evidence of that. Use your common sense. A reasonable  
4 person who consistently sees references to a statute, who time  
5 and again instructs others to agree and affirm that  
6 Richmond Capital would comply with that statute, that  
7 reasonable person would find out what that statute requires  
8 them to do or prohibits them from doing.

9 And what does Section 521 of the GLB Act say? It says  
10 you can't make false, fictitious, or fraudulent statements; in  
11 other words, you can't lie to get bank information. And the  
12 evidence clearly shows that defendant Braun knew he was not  
13 telling small businesses the truth about how much they would  
14 get in funding or how much Richmond Capital would collect  
15 from them.

16 The Court has already found that it is undisputed that  
17 the defendants misrepresented the amounts they would fund to  
18 consumers and collect from consumers. And defendant Braun  
19 often joked to his colleagues and employees in e-mails about  
20 what he was doing. For example, in Exhibit 62 where he says in  
21 one deal, we actually are overpaid \$6,000, so I went to  
22 contract for 10k, held back 2k in fees and 2k in refi, which he  
23 doesn't even owe. And then commenting, free ride lol, try and  
24 make extra money with no risk.

25 Or in Exhibit 65, this is another deal, where he ups

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Summation - Mr. Ashe

1 the fees after the contract signing, stating, honestly, I do  
2 that when I can. It was signed at 4,999, then I changed it to  
3 19,999, and 19,999, lol, because I smelled the opportunity.  
4 It's extra 30k. I got to do what I got to do.

5 Or this exchange in Exhibit 63 in which defendant  
6 Braun pretty much explained his MO when he says, I see your  
7 offers, then look at it clear and figure out what type of shady  
8 shit can I pull off.

9 Mr. Reich testified defendant Braun was a smart  
10 businessman, paid attention to detail. A smart businessperson  
11 is not going to jeopardize their payment processing account –  
12 the lifeblood of their company – or jeopardize their access to  
13 reports essential to deciding whether to make new deals.

14 Ask yourselves, would a reasonable person, a smart  
15 businessperson who works with contracts daily, who pays  
16 attention to details, would that reasonable person fail to read  
17 contracts essential to keeping their business operating? A  
18 reasonable person in defendant Braun's position would have  
19 known, or should have known, that the GLB Act prohibited his  
20 lies to small businesses. In other words, the evidence clearly  
21 shows that it is more likely than not that the defendant Braun  
22 knew his conduct was prohibited by the GLB Act and that if he  
23 didn't know, he should have.

24 And on the verdict form that the Court is going to  
25 give you, on the second question, the FTC's claims for civil

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Summation - Mr. Ashe

1 penalties, do you, the jury, find the defendant acted  
2 knowingly, I respectfully ask that you check the box yes.

3 Finally, having found defendant Braun liable for civil  
4 penalties, you must determine what amount that penalty should  
5 be. As the Court will instruct you, first, you will need to  
6 determine how many times defendant Braun violated the law.  
7 Then you will need to determine the appropriate amount of civil  
8 penalties for those violations. Under the FTC Act, penalties  
9 can be up to \$50,120 per violation.

10 Now, federal law says there is a five-year statute of  
11 limitations for civil penalties. Now, this is longer than the  
12 period for consumer redress that I discussed earlier. That  
13 means we need to determine to you, or demonstrate to you, the  
14 number of deals that defendants over-collected and underfunded  
15 in the five-year period before the FTC filed this case for  
16 purposes of civil penalties.

17 Remember, again, Dr. McAlvanah, he testified there was  
18 a total population of 1,499 deals within this five-year period.  
19 And with respect to defendants' over-collection violations,  
20 where they collected more from consumers than what was set  
21 forth in the merchant agreements, Dr. McAlvanah testified how  
22 based on his analysis of a statistically valid random sample of  
23 those 1,499 deals, that defendants over-collected 26.4 percent  
24 of the time, or 365 of those deals. He also testified that it  
25 was statistically reasonable that the violation rate could be

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1 as high as 37 percent, 554 of those 1,499 deals.

2 And with respect to defendants' underfunding  
3 violations, Dr. McAlvanah testified that based on his analysis  
4 of the statistically valid random sample of those 1,499 deals,  
5 that the defendants underfunded 34.6 percent of the time, or  
6 around 519 of those deals. He also testified that it was  
7 statistically reasonable that the violation rate could be as  
8 high as 49.1 percent, or such 736 deals.

9 Adding the number of over-collection violations to the  
10 number of underfunded violations, the evidence shows it's more  
11 likely than not the defendants engaged in a total of 1,290  
12 violations during the five-year period. So the last thing we  
13 are asking you to determine is the appropriate amount of civil  
14 penalties. And that's the number that's going to be multiplied  
15 by 1,290 to get the total civil penalty.

16 As you said, the FTC Act says that you can assess an  
17 amount up to \$50,120 per violation; in other words, any number  
18 between a penny and \$50,120. Now, keep in mind, the purpose of  
19 civil penalties is to both punish defendant Braun's unlawful  
20 conduct and to deter future violations by would-be fraudsters.

21 As the Court will instruct you, to help you determine  
22 the appropriate amount of civil penalties, you should consider  
23 several factors, including the degree of defendant Braun's  
24 culpability or responsibility for the violations, and any other  
25 merits you believe justice may require.

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Summation - Mr. Ashe

1           When you review all the evidence you have seen, we ask  
2           that you conclude a civil penalty of \$50,120 per violation is  
3           the appropriate amount.

4           Now, the evidence is overwhelming that defendant Braun  
5           personally participated in the law violations, that his degree  
6           of culpability or responsibility is high. The evidence shows  
7           that even if he was never named officer, defendant Braun was  
8           the person in charge, the person who made all the decisions.

9           The Court has already found it is undisputed that he  
10          exercised considerable control over Richmond Capital.  
11          Mr. Reich testified to it. You may take the adverse inference  
12          from Mr. Giardina's taking the Fifth to it. And you have seen  
13          in Exhibits 51 and Exhibits 57, defendant Braun certainly made  
14          sure his employees knew it. And the evidence is overwhelming  
15          that defendant Braun personally directed and participated in  
16          defendants' unlawful over-collection and underfunding  
17          practices.

18          Now, the Court has already determined that it is  
19          undisputed that he personally participated in the  
20          over-collection and the scheme to not pay the promised funding.  
21          You heard in his own instructions to his own employees in  
22          e-mail. In Exhibit 51, telling them in one deal, I added 5k to  
23          the balance. Or in Exhibit 56 that he would add some extra.  
24          Or in Exhibit 62, that he added 2k refi, which the business  
25          didn't even owe. Or in Exhibit 65, that after contract

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Summation - Mr. Ashe

1 signing, he changed the fees from the agreed, just under 5,000,  
2 to almost 40,000 because he smelled the opportunity. Or  
3 Exhibit 53, where he says we over-collected \$3,200 on the  
4 previous deal, lol. Or Exhibit 54, how he collected over  
5 16,000 from a business. Or Exhibit 64, saying we're 13k  
6 overpaid in our last deal.

7 Finally, I ask you to consider -- and the evidence  
8 clearly demonstrates -- a few matters as justice may require.  
9 First, when defendant Braun collected on outstanding merchant  
10 cash advances, he used egregious practices. I'm not going to  
11 replay it, but you remember the video from yesterday. You  
12 heard it with your own ears, you saw it with your own eyes, how  
13 defendant Braun treats his customers.

14 And Exhibit 73, Mr. Reich admitted earlier in this  
15 case that the defendant Braun threatened his customers. When  
16 he was asked to admit whether defendant threatened customers  
17 with physical violence, Mr. Reich admitted at least on one  
18 occasion he did. Or if the defendant threatened to ruin the  
19 reputation of customers, he admitted he was aware of threats.  
20 Or if the defendant threatened or ruined personal property, he  
21 admitted that defendant Braun threatened harm in various ways  
22 to consumers.

23 And, finally, I want you to remember that defendant  
24 Braun didn't just violate the law, he didn't just over-collect,  
25 didn't just underfund. He enjoyed doing it. He relished in

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Summation - Mr. Ashe

1 the cruelty. The evidence shows time and again how defendant  
2 Braun made light of his illegal practices.

3 We're all familiar with the texting lingo L-O-L,  
4 laughing out loud. You can hear defendant Braun in his own  
5 words and e-mails to employees. In Exhibit 57, when asked, did  
6 you ever send him his 25k you reserved, he said nope, lolllllll.  
7 Or in Exhibit 50, where he says, let's just leave on forever  
8 and over-collect, lol. Or Exhibit 53, where he says, we also  
9 over-collected 3,200 on the previous 5k deal, lol. Or  
10 Exhibit 54, I over-collected 16k, lol. Or Exhibit 60, lol, we  
11 are over 10k, and I'm running RCG, Viceroy, and RAM deals with  
12 this moron, lol. Or Exhibit 62, free ride, lol. Try and make  
13 extra money with no risk, lol. Or Exhibit 65, when asked, you  
14 changed the fees on this to 40k? He replies, yeah, lol.

15 As you can see, defendant Braun was laughing out loud  
16 a lot, as he either instructed his employees to over-collect or  
17 underfund, or he boasted about doing it. And he relished in  
18 the cruelty. The video just speaks for itself. Meanwhile, you  
19 can almost hear the glee in his voice, in e-mails, for example,  
20 in Exhibit 47, where he states, I ripped ass whole apart with  
21 11k fee. Or Exhibit 56, where he says he's going to inflate a  
22 consumer's outstanding balance because consumer is annoying as  
23 hell. Or in Exhibit 61, where he boasts I'm going to beat this  
24 bitch at his own game, and they never thought they'd land on a  
25 slick motherfucker like me, and concluding, I'm going to get

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Summation - Mr. Ashe

1 paid and make yet again another grown man cry.

2 But one of his colleagues described defendant Braun's  
3 cruelty best in Exhibit 49, when she told him it's disgusting,  
4 you're ruining this guy's business, and you think it's funny.

5 So when you begin your deliberations, I ask that you  
6 remember these other matters, how serious they are, how  
7 important they are to affect justice. When you consider the  
8 overwhelming evidence that we have presented, including the  
9 extent to which defendant Braun is personally responsible and  
10 those important matters that justice requires, I ask that you  
11 impose the largest civil penalty allowed. Remember, the  
12 purpose of civil penalties is not just to punish defendant  
13 Braun, but to deter future violations by others, send the  
14 message that lies and deception will not be tolerated in the  
15 marketplace.

16 And on Question 3 of the verdict form that the Court  
17 will give you, multiplying 120,090, the number of times the  
18 defendants violated the GLB Act, by what we're asking you to  
19 enter, \$50,120, civil penalty per violation, I respectfully  
20 request that you require defendant Braun to pay a civil penalty  
21 of \$64,654,800.

22 You're next going to hear from the defendant's lawyer.  
23 I ask that you give him the same time, attention, and  
24 consideration that you gave me. Then the Court will give you  
25 some final instructions, and when you go into the jury room to



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Summation - Mr. DiBenedetto

1 begin your deliberations, I ask that you remember what I said.  
2 I ask that you remember the evidence that has been presented, I  
3 ask that you remember the testimony that you have heard, I ask  
4 that you remember the e-mails, the documents, the charts that  
5 you have seen, and I ask that you use your common sense, and I  
6 ask that you return a verdict for the FTC, a verdict for the  
7 consumer.

8 Thank you for your time, your attention, and your  
9 consideration.

10 THE COURT: Thank you very much. And now we'll hear  
11 from defense counsel.

12 MR. DIBENEDETTO: Good morning, ladies and gentlemen  
13 of the jury. I want to first thank you for your time in this  
14 matter. My name is Michael DiBenedetto with Joseph Baratta.  
15 We represent the defendant, Jonathan Braun.

16 I want to say, it is important to remember that it is  
17 the burden of the FTC to prove their case, to prove these  
18 damages of nearly \$70 million against defendant Braun.

19 The plaintiff's counsel wants to set a precedent,  
20 deter others from committing these alleged heinous acts. You  
21 heard testimony from Mr. Reich yesterday, who is the owner of  
22 one of the corporate defendants who settled this matter for  
23 \$675,000. If you want to send a message to, quote/unquote,  
24 deter, deter other merchant cash advance companies from  
25 committing these alleged acts, and you settle for \$675,000 with

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Summation - Mr. DiBenedetto

1 one codefendant and asking for 70 million against another, it  
2 seems a bit egregious to me.

3 The FTC has not provided any proof of consumer harm.  
4 The FTC focused on the Actum application, whether or not  
5 Mr. Braun had knowledge of the GLB Act. Where are the Actum  
6 records? Where are the records that show these alleged  
7 overpayments and underfunding? All of these debits that came  
8 out, where are those records? Where are those consumers in  
9 this courtroom today? No one came and testified. No one came  
10 and testified about these alleged threats that Mr. Braun  
11 supposedly made.

12 It is the FTC's burden to prove damages.  
13 Mr. McAlvanah, who testified -- it's also important to remember  
14 Mr. McAlvanah is employed by the Federal Trade Commission. He  
15 testified that he was instructed by the staff attorneys on what  
16 to do. He testified that he never saw any of the agreements.  
17 He was given an Excel spreadsheet and said, have at it.

18 He also testified that he took a small random sample  
19 of the 1,499 deals and acknowledged that there's a wider margin  
20 of error. That is very important to understand. The one  
21 witness that they had to discuss damages acknowledged that  
22 there's a wide margin of error in his analysis.

23 For the FTC to ask for \$70 million, wouldn't it be  
24 important to conduct an analysis of the 1,499 deals, or  
25 something close to it, to shrink that margin of error, instead

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Summation - Mr. DiBenedetto

1 of saying it's too laborious or burdensome to conduct that kind  
2 of analysis? You're asking for \$70 million, \$70 million.

3 There is not a bank record in evidence that shows the  
4 over-collecting. There isn't a bank record that shows the  
5 underfunding. There isn't a consumer in here that said  
6 anything of that sort. It's mere -- here's a merchant cash  
7 advance agreement, and they want you to determine that that's  
8 worth \$70 million. It's not there.

9 Ms. Kwok testified, who was an investigator for the  
10 Federal Trade Commission. When cross-examined, she didn't seem  
11 to remember much. She didn't remember much. She was the  
12 investigator on this case. I asked her about the bank  
13 statements; she couldn't recall. I asked her about the tax  
14 returns; she couldn't recall. Her testimony contradicted  
15 Mr. McAlvanah. Mr. McAlvanah testified that he didn't review  
16 any of the documents or any of the records, but Ms. Kwok  
17 testified that Mr. McAlvanah gave her the records. So what is  
18 it?

19 Ms. Kwok didn't testify to any damages. She testified  
20 she interviewed some consumers, looked at some bank statements.  
21 What damages did she show? None.

22 Mr. McAlvanah was unable to show a finite number of  
23 damages. Ms. Kwok did not show any damages. Where are the  
24 records? Where are the records showing all of these alleged  
25 over-debitings?

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Summation - Mr. DiBenedetto

1 Plaintiff's counsel shows you a bunch of e-mails from  
2 Mr. Braun about all the over-collecting and the lols. We're  
3 not going to sit here and downplay that. Where are those  
4 agreements? They didn't link any of those alleged deals to  
5 anything in evidence. They didn't link that to any Actum  
6 records showing that Mr. Braun over-collected the 16k.

7 Let's discuss the video.

8 Again, we will not downplay Mr. Braun's words in the  
9 video. I also want the jury to remember that sometimes when  
10 you're angry at work, you say things, and sometimes you say  
11 things that you shouldn't say. But what's important to  
12 remember about that video is that the consumer on the other  
13 side acknowledged he owed Mr. Braun the money. He didn't say,  
14 you overcharged me. He didn't say, I was underfunded. He just  
15 said, I can't pay you. Where is the consumer harm? How was he  
16 harmed?

17 Yes, Mr. Braun said, I'll come spit in your face. I  
18 would have completely acknowledged that that's poor language.  
19 But where in that video does the consumer seem harmed? And the  
20 individual that took that video, Mr. Reich, settled this case  
21 for \$675,000. Mr. Braun should not be responsible for  
22 \$70 million when Mr. Reich was in the same room. He didn't  
23 stop Mr. Braun from speaking to the consumer that way. They  
24 probably both laughed at it together. But Mr. Reich got out  
25 easy. And the FTC is asking for Mr. Braun to bear the brunt to

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Summation - Mr. DiBenedetto

1 be their headline.

2 Mr. Giardina testified, who was another owner of the  
3 corporate defendants. He testified. Again, it's important to  
4 understand that it's the FTC's burden. Their own witness took  
5 the Fifth Amendment. They asked for an adverse inference  
6 against Mr. Braun for the testimony of Mr. Giardina. We asked  
7 for the complete opposite. Everything that plaintiff's counsel  
8 asked Mr. Giardina, we asked the negative, and he continued to  
9 take the Fifth Amendment. Mr. Braun did not force Mr. Giardina  
10 to sign any of these Actum documents, so we ask that any  
11 negative inference against Mr. Braun should not be taken.

12 There is no proof, other than some nasty e-mails that  
13 Mr. Braun sent to some of his coworkers that had some foul  
14 language. Where are those agreements? That 16k alleged  
15 overfunding. Plaintiff's counsel didn't even specify or get  
16 any sort of testimony about what agreement or what merchant  
17 that even was. The only numbers they have is from someone that  
18 worked for them.

19 I'm not going to sit here and say that Mr. Braun is a  
20 nice guy. I'm not going to sit here and say that Mr. Braun  
21 didn't say some stupid things. Mr. Braun is not liable for  
22 \$70 million. None of the other codefendants settled for  
23 anything over a million dollars. They are looking for a  
24 headline.

25 It is important to remember that there were all these

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Summation - Mr. DiBenedetto

1 claims of alleged threatening physical violence. All of these  
2 threats -- one video saying I'm going to spit in your face does  
3 not equate to \$70 million. It just doesn't.

4 So, again, I'm not going to sit here and say that  
5 Mr. Braun has not said some foul things, whether it was to a  
6 consumer in a video, whether it was to his coworkers in an  
7 e-mail, but when you deliberate and you look at those e-mails  
8 saying I overfunded 16k, lol, just remember, where is that  
9 agreement? Where is that agreement? Where are the records  
10 from Actum showing the 16 K overfunding? An e-mail is not  
11 proof that these things actually happened. The records, the  
12 bank records, the Actum records, would actually be the proof  
13 that the FTC should have brought, but they didn't.

14 They could have brought consumers in here to testify  
15 as to the actual harm that they suffered, the actual alleged  
16 overfunding and under-collecting, but they didn't. They  
17 brought in the two of their employees and the other  
18 codefendants that they settled with that had to cooperate.  
19 That's all they brought in.

20 Another important factor that I want the jury to  
21 deliberate about is Mr. Braun's ability to pay. They  
22 haven't -- there's no testimony about Mr. Braun's ability to  
23 pay. There is no evidence as to his bank records. There's no  
24 testimony as to his financial stature. There's nothing.  
25 That's their burden; they didn't meet it.

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Summation - Mr. DiBenedetto

1           So when the jury deliberates today, I ask that you  
2     return a verdict for Mr. Braun in the amount of \$0. Again, it  
3     is FTC's burden to prove consumer harm, and all of these  
4     monetary relief penalties – civil penalties, the violation of  
5     the GLB Act – where is the proof? Other than some e-mails,  
6     it's not there.

7           Thank you.

8           THE COURT: Thank you very much.

9           All right. Ladies and gentlemen, since we're moving  
10    with good speed, I think we'll just give you a 10-minute break  
11    at this time, and then I will give you my instructions of law.  
12    So we'll take a 10-minute break.

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1 (Jury not present)

2 THE COURT: Okay. Let me say that while occasionally  
3 I have been critical of counsel at one moment or another, I  
4 thought the summations by both sides were excellent. I thought  
5 that they fairly presented to the jury the two very different  
6 points of view that are involved in this case. So I commend  
7 counsel for a job well done.

8 All right. We'll take a 10-minute break.

9 (Recess)

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Charge

1 (Jury present)

2 THE COURT: Ladies and gentlemen, each of you now have  
3 a copy of my instructions. We are going to read them together  
4 but then you can take them with you into the jury room for your  
5 deliberations. And if you look at the table of contents, you  
6 will see that the instructions are divided into three parts.  
7 The first are general instructions, these apply really to all  
8 civil cases, then there are the instructions about the specific  
9 issues that you need to address in this case, and then there  
10 are some concluding instructions about how you fill out the  
11 verdict form and things like that. So, let's turn to  
12 instruction no. 1.

13 We are now approaching the most important part of this  
14 case, your deliberations. You have heard all of the evidence  
15 in the case as well as the final arguments of the lawyers for  
16 the parties. Before you retire to deliberate, it is my duty to  
17 instruct you as to the law that will govern your deliberations.  
18 These are the final and binding instructions which entirely  
19 replace the preliminary instruction I gave you earlier.

20 Regardless of any opinion you may have as to what the  
21 law may be or ought to be, it is your sworn duty to follow the  
22 law as I give it to you. Also, if any attorney or other person  
23 has stated a legal principle different from any that I state to  
24 you in my instructions, it is my instructions that you must  
25 follow.

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Charge

1           Because my instructions cover many points, I have  
2 provided each of you with a copy of them not only so that you  
3 can follow them as I read them to you now, but also so that you  
4 can have them with you for reference throughout your  
5 deliberations. In listening to them now and reviewing them  
6 later, you should not single out any particular instruction as  
7 alone stating the law but instead consider the instructions as  
8 a whole.

9           Your duty is to decide the fact issues in the case and  
10 arrive, if you can, at a verdict. You, the members of the  
11 jury, are the sole and exclusive judges of the facts; you pass  
12 upon the weight of the evidence; you determine the credibility  
13 of the witnesses; you resolve such conflicts as there may be in  
14 the testimony; and you draw whatever reasonable inferences you  
15 decide to draw from the facts as you determine them.

16           In determining the facts, you must rely upon your own  
17 recollection of the evidence. To aid your recollection, we  
18 will send you all the documentary exhibits at the start of your  
19 deliberations. If you want to see the video, please let us  
20 know and we will bring you back to court to play it for you.  
21 Also, if you need to review any particular items of testimony,  
22 we can arrange to provide them to you in transcript or  
23 read-back form.

24           Please remember that none of what the lawyers have  
25 said in their opening statements, in their closing arguments,

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Charge

1 in their objections or in their questions is evidence. Nor is  
2 anything I may have said evidence. The evidence before you  
3 consists of just three things: The testimony given by  
4 witnesses that was received in evidence, the exhibits that were  
5 received in evidence, and the undisputed facts found by the  
6 Court, which you will recall you got in written form as well.

7 Testimony consists of the answers that were given by  
8 the witnesses to the questions that were permitted either here  
9 in court or in the depositions that were read into evidence.  
10 Please, remember the questions, although they may provide the  
11 context for answers are not themselves evidence. Only answers  
12 are evidence and you should therefore disregard any question to  
13 which I sustained an objection. Also, you may not consider any  
14 answer that I directed to you disregard or that I directed be  
15 stricken from the record. Likewise, you may not consider  
16 anything you heard about the contents of any exhibit that was  
17 not received in evidence.

18 More generally, you should be careful not to speculate  
19 about matters not in evidence. Your focus should be solely on  
20 the evidence that was presented here in court.

21 It is duty of the attorney for each side of the case  
22 to object when the other side offers testimony or other  
23 evidence that the attorney believes is not properly admissible.  
24 Counsel also have the right and duty to ask the Court to make  
25 rulings of law and to request conferences at the side bar out

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Charge

1 of the hearing of the jury -- although I don't think we had any  
2 side bars in this case. All such questions of law must be  
3 decided by me. You should not show any prejudice against any  
4 attorney or party because the attorney objected to the  
5 admissibility evidence, asked for a conference out of the  
6 hearing of the jury, or asked me for a ruling on the law.

7 I also ask you to draw no inference from my rulings or  
8 the fact that on occasion I asked questions of certain  
9 witnesses. My rulings were no more than applications of the  
10 law and my questions were only intended for clarification or to  
11 expedite matters. You should understand that I have no opinion  
12 as to the verdict you should render in this case.

13 You are to perform your duty of finding the facts  
14 without bias or prejudice or sympathy or hostility as to any  
15 party, for all parties are equal under the law. You are to  
16 perform your final duty in an attitude of complete fairness and  
17 impartiality. You are not to be swayed by rhetoric or  
18 emotional appeals. It must be clear to you that if you were to  
19 let extraneous considerations interfere with your thinking,  
20 there would be a risk that you would not arrive at a true and  
21 just verdict. So, do not be guided by anything except clear  
22 thinking and calm analysis of the evidence.

23 As you know, this is a civil case. To prevail in a  
24 civil case, a party who is making a claim against another party  
25 has what we call the burden of proof which is the burden of

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Charge

1 establishing each of the essential elements of the claim by a  
2 preponderance of the credible evidence.

3 "Credible evidence" means such evidence that you find  
4 worthy of belief. To establish an element of a claim by  
5 preponderance of the credible evidence means to prove that the  
6 element is more likely true than not true. When assessing  
7 whether a party has met its burden of proof or failed to do so,  
8 the question is not which party called the greater number of  
9 witnesses or how much time one party or another spent during  
10 the trial. The focus must always be on the quality of the  
11 evidence, its persuasiveness in convincing you of its truth.

12 In deciding whether a party meets its burden of proof  
13 you may consider both direct evidence and circumstantial  
14 evidence.

15 Direct evidence is evidence that proves a fact  
16 directly. For example, where a witness testifies to what he or  
17 she saw, heard, or observed, that is called direct evidence.

18 Circumstantial evidence is evidence that tends to  
19 prove a fact by proof of other facts. To give a simple  
20 example, suppose when you came into the court house today the  
21 sun was shining and it was a nice day, but the court house  
22 blinds were drawn and you could not look outside. Later, as  
23 you were sitting here, someone walked in with a dripping wet  
24 umbrella, and soon after somebody else walked in with a  
25 dripping wet raincoat. Now, on our assumed facts, you cannot

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Charge

1 look outside the courtroom and you cannot see whether it is  
2 raining so you have no direct evidence of that fact. But on  
3 the combination of the facts about the umbrella and raincoat,  
4 it would be reasonable for you to infer that it had begun  
5 raining.

6 That is all there is to circumstantial evidence.  
7 Using your reason and experience, you infer from established  
8 facts the existence or the non-existence of some other fact.  
9 Please note, however, it is not a matter of speculation or  
10 guess, it is a matter of logical inference.

11 The law makes no distinction between direct and  
12 circumstantial evidence. Circumstantial evidence is of no less  
13 value than direct evidence, and you may consider either or both  
14 and give them such weight as you conclude is warranted.

15 It must be clear to you by now that counsel for the  
16 opposing parties are asking you to draw very different  
17 conclusions about various factual issues in the case. An  
18 important part of that decision will involve making judgments  
19 about the testimony of the witnesses you have listened to and  
20 observed. In making these judgments, you should carefully  
21 scrutinize all of the testimony of each witness, the  
22 circumstances under which each witness testified, and any other  
23 matter in evidence that may help you to decide the truth and  
24 the importance of each witness' testimony.

25 Your decision to believe or to not believe a witness

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Charge

1 may depend on how that witness impressed you. How did the  
2 witness appear to you? Was the witness, candid, frank, and,  
3 forthright or did the witness appear to you to be basic or  
4 suspect in some way? How did the way the witness testified on  
5 direct examination compare with how the witness testified on  
6 cross-examination? Was the witness consistent or  
7 contradictory? Did the witness appear to know what he or she  
8 was talking about? Did the witness strike you as someone who  
9 was trying to report his or her knowledge accurately? These  
10 are examples of the kinds of common sense questions that you  
11 should ask yourselves in deciding whether a witness is or is  
12 not truthful.

13 How much you choose to believe a witness may also be  
14 influenced by a witness' bias. Does the witness have a  
15 relationship with any of the parties that may affect how he or  
16 she testified? Does the witness have some interest, incentive,  
17 loyalty or motive that might cause him or her to shade the  
18 truth? Does the witness have some bias, prejudice, or  
19 hostility that may cause the witness to give you something  
20 other than a completely accurate account of facts he or she  
21 testified to?

22 You should also consider whether the witness had an  
23 opportunity to observe the facts he or she testified about, and  
24 whether the witness' recollection of the facts stands up in  
25 light of the other evidence in the case.

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1 In other words, what you must try to do in deciding  
2 credibility is to size up a person just as you would in any  
3 important matter where you are trying to decide if a person is  
4 truthful, straightforward, and accurate in his or her  
5 recollections.

6 The law permits parties to offer opinion evidence for  
7 witnesses who were not involved in the underlying events in the  
8 case but who, by education or experience, profess to expertise  
9 in a specialized area of knowledge. In this case,  
10 Dr. Dr. Patrick McAlvanah was such a witness. Specialized  
11 testimony is presented to you on the theory that someone who is  
12 learned in the field may be able to assist you in understanding  
13 the specialized aspects of the evidence.

14 But your role in judging credibility and assessing  
15 weight applies just as much to these witnesses as to other  
16 witnesses. When you consider the specialized opinions that  
17 were received in evidence in this case, you may give them as  
18 much or as little weight as you think they deserve. For  
19 example, a specialized witness necessarily bases his or her  
20 opinions, in part or in whole, on what the witness learned from  
21 others, and you may conclude that the weight given the witness'  
22 opinions may be affected by how accurate or inaccurate or  
23 reliable that underlying information is. More generally, if  
24 you find that the opinions of a specialized witness were not  
25 based on sufficient data, education, or experience, or if you



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Charge

1 should conclude that the trustworthiness or the credibility of  
2 such a witness is questionable, or if the opinion of the  
3 witness is outweighed, in your judgment, by other evidence in  
4 the case, then you may, if you wish, disregard the opinions of  
5 that witness, either entirely or in part. On the other hand,  
6 if you find that a specialized witness is credibility and that  
7 the witness' opinions are based on sufficient data, education,  
8 and experience, and that the other evidence does not give you  
9 reason to doubt the witness' conclusions, you may, if you wish,  
10 rely on that witness' opinions and give them whatever weight  
11 you deem appropriate.

12 Applying the general principles that I have just  
13 discussed, you must now determine, in accordance with my  
14 instructions, whether the FTC has established its entitlement  
15 to damages and civil penalties. As I already informed you, the  
16 Court previously found Mr. Braun liable for violating federal  
17 law, specifically the Gramm-Leach-Bliley Act (the "GLB Act"),  
18 by making material misrepresentations about the amount of money  
19 that borrowers would receive and the amount of money that the  
20 borrowers would have to repay under their merchant cash advance  
21 ("MCA") agreements. In addition, the Court has already found  
22 that Mr. Braun is liable not only for his own material  
23 misrepresentations but also for the material misrepresentations  
24 that were made by RCG Advances, LLC; RAM Capital Funding, LLC;  
25 Robert Giardina and Tzvi Reich, who I will collectively refer

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Charge

1 to as the co-defendants. You must accept these conclusions on  
2 liability as settled and binding.

3 As a result, there are only three remaining issues for  
4 you to determine.

5 First, what is the monetary amount of damages, if any,  
6 caused to the borrowers by misrepresentations made to them by  
7 Mr. Braun and his co-defendants.

8 Second, did Mr. Braun know that making these  
9 misrepresentations was deceptive or misleading and a violation  
10 of the law?

11 Third, if you find that Mr. Braun so knowingly made  
12 these representations, what is the amount of civil penalties  
13 that should be imposed on Mr. Braun?

14 I will now discuss each of these issues in more  
15 detail.

16 The FTC is seeking what are called "damages" for the  
17 monetary harm that the misrepresentations caused to the  
18 borrower. In particular, the FTC is seeking monetary damages  
19 for those MCA agreements to which Mr. Braun and his  
20 co-defendants either underfunded, meaning that the borrower  
21 received less money than what the borrower was supposed to  
22 receive, or over-collected, meaning that Mr. Braun and his  
23 co-defendants took more money from borrowers than what the  
24 borrowers owed. As you know, it has already been established  
25 in an earlier phase of the case that such representations were

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1 made and that Mr. Braun is legally liable for his role relating  
2 thereto. However, because of what is called the statute of  
3 limitations, the damages are limited to the amount of such  
4 monetary harm that occurred during the three-year period  
5 between June 10, 2017, and June 10, 2020. Indeed, the FTC is  
6 only seeking damages for such harms as occurred between June  
7 10, 2017 and November 2018.

8 As to the amount of damages resulting from these  
9 misrepresentations, the FTC can meet its burden of proof to  
10 show monetary damages by putting forward a reasonable estimate  
11 of the harm to borrowers. Once the FTC puts forward evidence  
12 of a reasonable estimate, the burden shifts to Mr. Braun to  
13 show why the FTC's reasonable estimate is inaccurate or  
14 unreasonable.

15 The FTC is also seeking civil penalties. To recover  
16 civil penalties, the FTC must first prove that Mr. Braun acted  
17 knowingly. "Knowingly" here has two aspects. First, the FTC  
18 must show that Mr. Braun knew that material misrepresentations  
19 were being made to borrowers with his consent about the amount  
20 of money that borrowers were to receive and/or must repay.  
21 Second, the FTC must show that Mr. Braun knew or should have  
22 known he was violating the GLB Act. The FTC can show the  
23 second aspect by proving that Mr. Braun had actual knowledge he  
24 was violating the GLB Act or that a reasonable person under the  
25 circumstances would have known there was a federal law

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Charge

1 prohibiting deceptive practices in the making of agreements  
2 like the MCA agreements.

3 If you find that the FTC has failed to prove these  
4 requirements by a preponderance of the evidence, then you must  
5 not award any civil penalties. If, however, you find that the  
6 FTC has proven these requirements by a preponderance of the  
7 evidence, then you must calculate the appropriate amount of  
8 civil penalties.

9 Here, because of a different statute of limitations,  
10 the FTC is entitled to seek up to \$50,120 for each violation of  
11 the GLB Act that occurred between June 10, 2015 and June 10,  
12 2020; but, in fact, the FTC is only seeking such penalties  
13 through November 2018. This requires you to determine both how  
14 many times Mr. Braun violated the law during this period, and  
15 how much to award the FTC per violation. In determining the  
16 number of violations, you should consider not just the  
17 violations Mr. Braun personally committed but also any  
18 violations that were committed by his co-defendants with his  
19 consent. In determining how much to award the FTC per  
20 violation, which can range anywhere from one cent to \$50,120  
21 per violation, you should consider not only Mr. Braun's  
22 culpability but also any other matters that you believe justice  
23 may require. You should multiply the number of times Mr. Braun  
24 violated the GLB Act by what you determine is the appropriate  
25 amount per violation to arrive at total civil penalties. You

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Charge

1 should record the final, total amount on the verdict form.

2 You will shortly retire to the jury room to begin your  
3 deliberations. As soon as you get to the jury room, please  
4 select one of your number as the foreperson to preside over  
5 your deliberations and to serve as your spokesperson if you  
6 need to communicate with the Court.

7 You will be bringing with you into the jury room a  
8 copy of my instructions of law and a verdict form on which to  
9 record your verdict. Let me pause there.

10 Ladies and gentlemen, you already saw put up on the  
11 screen the verdict form but here it is again. It is a simple,  
12 one-page document, that asks you three questions: First, how  
13 much do you award in damages; second, whether or not Mr. Braun  
14 acted knowingly as I have defined that term; and third, if he  
15 did act knowingly, how much you award in penalties.

16 After you have reached your verdict, your foreperson  
17 will sign it, date it, fold it up, and seal it in this envelope  
18 very cleverly marked "verdict" and that envelope will be  
19 brought to me but I won't open it and read it until you are all  
20 back here in the courtroom. And then, after we have read it, I  
21 will ask each of you individually whether that is your verdict.  
22 And the reason we go through that is to be absolutely sure we  
23 have your verdict as you have decided it.

24 So, back to the instructions.

25 In addition, we will send to the jury room all the

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Charge

1 documentary exhibits that were admitted into evidence. If you  
2 want to see the video, let us know and we will bring you back  
3 to the courtroom to see it. If you want any of the testimony,  
4 that can also be provided in either transcript or read-back  
5 form, but please remember that it is not always easy to locate  
6 what you might want so be as specific as you possibly can be in  
7 requesting portions of testimony.

8 Any of your requests, in fact any communication with  
9 the Court, should be made to me in writing, signed by your  
10 foreperson, and given to the marshal who will be available  
11 outside the jury room throughout your deliberations. After  
12 consulting with counsel, I will respond to any question or  
13 requests you have as promptly as possible, either in writing or  
14 by having you return to the courtroom so that I can speak with  
15 you in person.

16 You should not, however, tell me or anyone else how  
17 the jury stands on any issue until you have reached your  
18 verdict and recorded it on your verdict form.

19 Each of you must decide the case for yourself, after  
20 consideration, with your fellow jurors, of the evidence in the  
21 case, and your verdict must be unanimous. In deliberating,  
22 bear in mind that while each juror is entitled to his or her  
23 opinion, you should exchange views with your fellow jurors.  
24 That is the very purpose of jury deliberation -- to discuss and  
25 consider the evidence, to listen to the arguments of fellow

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Charge

1 jurors, to present your individual views, to consult with one  
2 another, and to reach a verdict based solely and wholly on the  
3 evidence.

4 If, after carefully considering all of the evidence  
5 and the arguments of your fellow jurors, you entertain a  
6 conscientious view that differs from the others', you are not  
7 to yield your view simply because you are outnumbered. On the  
8 other hand, you should not hesitate to change or modify an  
9 earlier opinion that, after discussion with your fellow jurors,  
10 now appears to you erroneous.

11 In short, your individual must reflect your individual  
12 views and it must also be unanimous.

13 This completes my instructions of the law.

14 So, any suggestions or objections previously made to  
15 the charge are deemed remade at this time and the Court stands  
16 by its previous rulings.

17 So, ladies and gentlemen, let me remind you that you  
18 can take as little or as long as you want for deliberations.  
19 At about 1:00 we will send in lunch so you can have lunch. The  
20 lawyers will be here at all times except between 1:00 and 2:00  
21 when they will have lunch as well. If you haven't reached a  
22 verdict by 4:30, you should go home and then come back in the  
23 morning at 9:30, and if that happens your foreperson is in  
24 charge of making sure that all nine of you are back before you  
25 resume your deliberations.

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## Deliberations

1 So, we will swear in the marshal.

2 THE DEPUTY CLERK: Marshal, please come forward.

3 THE MARSHAL: Yes.

4 (Marshal sworn)

5 THE DEPUTY CLERK: Jurors, please follow the marshal.

6 (At 11:06 a.m., the jury retired to deliberate)

7 THE COURT: Please, be seated.

8 I will give a copy of my charge to my law clerk marked  
9 as Court Exhibit 1 to docket. Now, while the jury is  
10 deliberating, we need to have at least one lawyer from each  
11 side who can answer any questions either right in the courtroom  
12 or just outside, not on some other floor, not outside the court  
13 house. The only exception is between 1:00 and 2:00 when you  
14 are all excused to have lunch.

15 Any questions anyone has? Very good. We will see you  
16 when we get a note. Thank you very much. My law clerk will  
17 take the exhibits and the index to the marshal to give to the  
18 jury.

19 (Recess pending verdict)

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1 (At 2:24 p.m., a note was received from the jury)

2 (Jury present)

3 THE COURT: Please be seated.

4 So I understand we have a verdict. In a moment, I'll  
5 open the verdict form, but I never comment on the verdict.  
6 That's your job to decide, not mine. But I do want to comment  
7 on what a terrific jury this has been. I observed you out of  
8 the corner of my eye, and you were all very attentive, very  
9 prompt, followed all the evidence. I do have a trial starting  
10 in two weeks. It will only last about a month. You don't mind  
11 staying for that, do you? Actually, you'll be glad to know  
12 you're excused from federal jury service for four years, and  
13 that's a reflection of your excellent service. So I thank you  
14 again for your service.

15 Okay. Let's see the verdict slip.

16 Okay. The verdict is in proper form. I will give it  
17 to my courtroom deputy to take the reading of the verdict.

18 DEPUTY CLERK: Will the foreperson please rise?

19 As to *United States v. Jonathan Braun*, you, the jury,  
20 award the FTC the following monetary damages from defendant  
21 Jonathan Braun. You say?

22 THE JUROR: \$3,500,000.

23 DEPUTY CLERK: On the FTC's claim for civil penalties,  
24 do you, the jury, find that the defendant acted knowingly as  
25 defined in the Court's instructions, yes or no? You say?

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1 THE JUROR: Yes.

2 DEPUTY CLERK: Having found that the defendant acted  
3 knowingly, you, the jury, award the FTC the following civil  
4 penalties. You say?

5 THE JUROR: \$7,500,000.

6 DEPUTY CLERK: Shall I poll the jury?

7 THE COURT: Yes.

8 DEPUTY CLERK: Juror Number 1, is that your verdict?

9 THE JUROR: Yes, it is.

10 DEPUTY CLERK: Juror Number 2, is that your verdict?

11 THE JUROR: Yes, it is.

12 DEPUTY CLERK: Juror Number 3, is that your verdict?

13 THE JUROR: Yes, it is.

14 DEPUTY CLERK: Juror Number 4, is that your verdict?

15 THE JUROR: Yes.

16 DEPUTY CLERK: Juror Number 5, is that your verdict?

17 THE JUROR: Yes.

18 DEPUTY CLERK: Juror Number 6, is that your verdict?

19 THE JUROR: Yes.

20 DEPUTY CLERK: Juror Number 7, is that your verdict?

21 THE JUROR: Yes.

22 DEPUTY CLERK: Juror Number 8, is that your verdict?

23 THE JUROR: Yes.

24 DEPUTY CLERK: Juror Number 9, is that your verdict?

25 THE JUROR: Yes.

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1 DEPUTY CLERK: Jury polled; verdict unanimous.

2 THE COURT: Thank you very much, and we'll take the  
3 verdict form back from you.

4 So, again, you are now excused for real, with a great  
5 thanks of the Court. And I thank you again for your service  
6 and also hope you will have a lovely rest of the day, so you  
7 can leave now.

8 (Jury not present)

9 THE COURT: You may be seated.

10 All right. So the one part of that verdict that is  
11 binding on me, of course, is the answer to the second question  
12 that the defendant acted knowingly in the way that it was  
13 defined. With respect to the other two parts of the verdict,  
14 those are advisory, but, of course, I will give them  
15 substantial weight, but I'm going to give each side the  
16 opportunity to make brief additional submissions on the first  
17 item. All I want is any further argument that anyone wants to  
18 make. I don't want any additional evidence. The evidence was  
19 all submitted.

20 On the third, the penalties, since there were certain  
21 factors that were kept out of this trial for reasons I  
22 previously indicated, if someone wants to put in something in  
23 the way of evidence with respect to some of the other factors,  
24 I will consider it -- although, I think you should keep that to  
25 a minimum.

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1           For example, I'm already aware of the prior  
2 conviction, so you don't need to put in anything on that, you  
3 can argue -- I think it's an interesting argument -- of whether  
4 I should give any weight to that prior conviction or give  
5 meaningful weight to it. As I understand it, but you can  
6 clarify this in your submissions, it was a money laundering  
7 conviction for which the defendant was ultimately pardoned; is  
8 that right?

9           MR. ASHE: His sentence was commuted.

10          THE COURT: Or commuted. And it was for money  
11 laundering in connection with drugs?

12          MR. ASHE: Yes, your Honor.

13          THE COURT: So, obviously, that was a serious matter,  
14 but I'm not sure that it particularly relates to the misconduct  
15 that he's now been found liable for here.

16          So, anyway, I'll be happy to hear whatever anyone  
17 wants to say, but you don't need to put in anything of an  
18 evidentiary nature.

19          The one thing that possibly you might want to put in,  
20 something of an evidentiary nature, is his capacity to pay. I  
21 would like to avoid, if we can, any further hearing on that  
22 evidentiary hearing. But maybe a declaration and a response to  
23 the declaration.

24          So initial papers for all that I've just described  
25 should be submitted on January 17, limited for the argument to

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1 ten double space pages, and if there are any declarations  
2 attached, whatever they are, will be. The response from each  
3 side is on January 24, again, limited to ten double space  
4 pages.

5 And I will endeavor to get you a final decision by the  
6 end of the month, but I can't guarantee that. I have, as you  
7 just heard, another trial going on that's going to take some  
8 time. But, certainly, worst case, it will be sometime in  
9 February. And then final judgment can, of course, be appealed.

10 Anything else we need to take up today?

11 MR. ASHE: Not for the FTC, your Honor.

12 MR. DIBENEDETTO: No, your Honor.

13 THE COURT: Very good. So I thank counsel again, all  
14 counsel, for your help -- even the gentleman who sat a distance  
15 on the -- in my view, he's of the far left, but he may prefer  
16 to think he's on the far right. But in any way, my thanks to  
17 everyone, and I look forward to seeing your papers.

18 That concludes this proceeding.

19 (Adjourned)  
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